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Supreme Court, U.S.
FILED
09-140 JUL 28 2009
OFFICE OF THE CLERK
William K. Suter, Clerk

Number

In The
SUPREME COURT OF THE UNITED STATES

JAMES R. RUSHING, JR.
PETITIONER

Versus

LAWRENCE KELLY, Superintendent, and JIM HOOD, Attorney General of Mississippi

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

to

PETITION FOR A WRIT OF CERTIORARI

James R. Rushing, Jr.
Pro Se
901 - 21st Street
Meridian, MS 39301
601) 482-8764
Petitioner

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I. Order of Fifth Circuit with reasons

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 08-60314
USDC No. 3:05-CV-101

JAMES R RUSHING, JR,

Petitioner -Appellant

v.

SUPERINTENDENT LAWRENCE KELLY,

Respondent -Appellee

Appeal from the United States District Court
for the Southern District of Mississippi at Jackson
(Filed: U. S. Court of Appeals
Mar 16 2009
Charles L. Fulbruge, III Clerk)

O R D E R:

James R. Rushing, Jr., Mississippi prisoner # 04851, filed a 28 U.S.C. § 2254 petition challenging his 1997 conviction and 10-year sentence for rape. The district court considered the merits of each of Rushing's claims and dismissed the petition with prejudice.

Represented by counsel, Rushing contends that there was insufficient evidence to support his conviction because, under the correct view of evidence, the sexual encounter at issue was consensual. He also contends that trial counsel was ineffective for failing to do the following: (1) introduce emergency room reports and the victim's prior statements to show that her testimony regarding the severity of the assault that preceded the rape was exaggerated; (2) introduce a detective's report wherein the victim clarified that she was not restrained at the time of the rape; (3) move to sever the rape charge from an aggravated assault charge, which resulted in a conviction but was later overturned, because the testimony regarding the assault could "be used to show some force on Rushing's

part as a basis for the rape;" (4) prove the relationship between Rushing and the victim, "the question of the paternity of the child" that the couple had together, the fact that Rushing owned the trailer in which the victim resided, and that it would thus have been to the victim's benefit to placate Rushing with consensual sex; and (5) call the emergency room doctor and a utility worker who went to the trailer on the morning of the rape to testify regarding "the conniving nature of the purported rape."

With respect to the constitutional claims that Rushing has raised in his motion seeking a certificate of appealability (COA), Rushing has not shown that reasonable jurists would find the district court's assessment of those claims to be debatable. *See Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003); *Slack v. McDaniel,* 529 U.S. 473, 484(2000). Accordingly, his motion for a COA to appeal the district court's dismissal of those claims is denied. Al of the other claims raised in the district court, including additional assertions of ineffective assistance of counsel, that were not raised in Rushing's COA motion before this court have been abandoned. *See Hughes v. Johnson,* 191 F.3d 607, 613(5th cir. 1999).

COA DENIED.

s/Fortunato P. Benavides
United States Circuit Judge

II. Order of Fifth Circuit Panel Denying Reconsideration

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 08-60314
USDC No. 3:05-CV-101

JAMES R RUSHING, JR,

Petitioner -Appellant

v.

SUPERINTENDENT LAWRENCE KELLY,

Respondent -Appellee

Appeal from the United States District Court
for the Southern District of Mississippi at Jackson

Before JOLLY, BENAVIDES, and HAYNES, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration IT IS ORDERED that the motion is *Denied.*

(Filed: U. S. Court of Appeals
Apr 29, 2009
Charles L. Fulbruge, III Clerk)

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitution of the United States of America

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. Anti-terrorism and Effective Death Penalty Act

28 U.S.C.A. § 2241

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(c) The writ of habeas corpus shall not extend to a prisoner unless—(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or ...

28 U. S. C. 2253(c)(1)

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U. S. C. 2254(d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—
(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

C. Mississippi Statutes

§ 97-3-65. Rape; carnal knowledge of child under fourteen years of age.(Amended **Mississippi Laws** 1998, Ch. 549, § 2, eff. July 1, 1998)

(2) Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person's consent, by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

IV. Other Materials

A. Judgment of District Court Adopting Magistrate Report and Recommendation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JAMES R. RUSHING, #04851

PETITIONER

VS.
CIVIL ACTION 3:05cv101 TSL-JCS

LAWRENCE KELLY AND JIM HOOD

RESPONDENTS

JUDGMENT

This matter having come on to be heard on this date upon the report and recommendation of United States Magistrate Judge James C. Sumner entered in this cause on February 8, 2008, and the court, having adopted said report and recommendation as the finding of this court by order dated this day, finds that this cause should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the above captioned cause be, and the same is hereby, dismissed with prejudice.

SO ORDERED this the 14th day of March, 2008.

/s/Tom S. Lee
UNITED STATES DISTRICT JUDGE

(Filed: U. S. District Court
S. D. Mississippi
Mar 14, 2008
J. T. Noblin, Clerk)

B. Magistrate Judge Report and Recommendation

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JAMES R. RUSHING, #04851

PETITIONER

VS. CIVIL ACTION NO. 3:O5CV1OITSL-JCS

LAWRENCE KELLY AND JIM HOOD

RESPONDENTS

(Filed: U. S. District Court
S. D. Mississippi,
Feb. 8, 2008
J. T. Noblin, Clerk)

REPORT AND RECOMMENDATION

This cause is before the undersigned on the petition of James R. Rushing for habeas corpus relief pursuant to 28 U.S.C. §2254. Having considered Rushing's petition, the State's answer thereto and the state court record, the undersigned concludes, for the reasons which follow, that the petition is not well taken and should be denied.

I. PROCEDURAL HISTORY

James R. Rushing, Jr., was convicted by a jury of aggravated assault and rape on September 11, 1997, in the Circuit Court of Lauderdale County, Mississippi. He was sentenced to twenty years on the aggravated assault conviction and ten years on the rape conviction. to run concurrently.

Rushing appealed his conviction and sentence through counsel to the Mississippi Supreme Court, assigning as error the following:

A. Whether a jury instruction on aggravated assault with a "deadly weapon" without the element of "serious bodily injury" is a variance from an indictment that does not have "deadly weapon" as an element but only has "serious bodily injury" and the defendant is denied

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proper constitutional notice of the charges, a fair trial, the right to confrontation and due process of law.

B. Whether jury instructions on aggravated assault are "plain error" as a judicial comment on the evidence by containing the phrases "when used as a weapon under the existing circumstances" and the phrase "a deadly weapon, specifically a broken pool stick" and thus the defendant is denied a fair trial, confrontation of witnesses and due process of law.

C. Whether the jury instructions under facts which showed hilling with a broken pool stick, pointing a gun and kicking with a foot are fatally confusing and abstract when the only specific reference to "deadly weapon"in the instructions points to the pool stick and thus the defendant is denied a fair trial and due process of law and trial by jury.

D. Whether the evidence of forcible rape is sufficient to support a verdict of guilty when there was no contemporaneous force and the victim had many opportunities to seek aid, assistance and flee from the presence of the defendant with whom she had a long term beneficial sexual liaison and she traveled with him back to her trailer and nearly twelve hours after the coupling first told the

interrogating officer she had not been sexually assaulted.

E. Whether the defendant was denied his right to confrontation of witnesses and a fair trial when moments before the victim's son was to testify, the state first disclosed to the defendant that the son would testify to defendant's admission of assaulting the mother and testify that the defendant had made three valuable offers to the mother if she would drop the charges.

F. Whether the defendant was denied his right to confrontation of witnesses and a fair trial when the court refused admissibility of the victim's contradictory statement to the interrogating officer that she had not been sexually assaulted.

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G. Whether the evidence was sufficient to support a verdict of aggravated assault, when the victim only had bruises, redness on the throat from alleged choking and a broken finger and gave a contradictory and exaggerated account of the incident with the defendant at the bar and much later engaged in voluntary sex with him after rejecting an opportunity to return to her trailer alone without defendant.

On February 8, 2000, on Rushing's motion for rehearing, the Mississippi Court of Appeals, to whom the case had been assigned by the Mississippi Supreme Court, affirmed Rushing's rape conviction and sentence, but reversed and remanded the aggravated assault conviction. **Fn1** Rushing v. State, 753 So. 2d 1136 (Miss. App. 2000).

Thereafter, Rushing filed, again through counsel, a "Appellant's Motion for Post-Conviction Relief and Bail." In this pleading before the Mississippi Supreme Court, he urged the following grounds:

A. Facts exclude rape.

B. Material evidence some of which is newly discovered and some of was not offered in the original trial, and which would have resulted in acquittal of the rape charge.

C. Ineffective assistance of counsel:

(1) failure to make certain essential pretrial motions such as requirements to prove inconsistent statements by the prosecutrix;

(2) failure to make a Motion for Severance;

(3) failure to make a Pre-trial Motion to strike a defamatory alias injected by prosecution;

(**Fn 1** Rushing has not been reprosecuted for the assault charge.)

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(4) failure to make a Motion to restrict prosecutors from using alias in voir dire, opening statements, examination of witnesses, and closing statements;

(5) failure to adequately prepare for trial in a reasonable manner including failure to notify the appellant timely and to investigate the facts and prepare trial subpoenas for essential

documentary evidence and material witnesses to testify;

(6) failure to adequately cross-examine the prosecutrix;

(7) failure to adequately present and argue a Motion for Directed Verdict on the rape;

(8) failure to offer any rebuttal evidence, police records, testimony of medical doctor who conducted rape test;

(9) failure to carry out any pretrial discovery;

(10) failure to furnish proper and essential jury instructions defining the rape statute and the burden of the state to prove forcible rape.

D. Prejudicial and unfair tactics by prosecution consisting of a two count indictment, adding the rape charge to give force to the assault charge and changing the name in the indictment by adding the Appellant s a/k/a "devil catcher" so as to connote that Rushing was a professional criminal and to unduly prejudice the jury, and unfairly referring to him by this name in Voir Dire through closing arguments.

On August 8, 2001, the Mississippi Supreme Court granted Rushing's application to file a postconviction motion on the issue of the victim's recanted testimony. After an evidentiary hearing,

on October 12, 2001, the circuit court denied Rushing's motion for relief, from which Rushing appealed, raising the following issues:

A. Whether a defendant is denied due process of law and fundamental fairness when the hear ing judge finds that had the recanting witness testified there was no way to know what she would say, whether to support her trial testimony or recant it, and denies a new trial by finding that recanting deposition was the result of pressure,where the ultimate finding of truth at trial is clearly erroneous and not supported by substantial evidence and a new trial should be ordered.

B. Whether the standard of review is one of de novo rather than deference when the hearing judge reflects in his opinion and ruling that the recanting witness cannot be relied upon to tell the truth, but faults the prisoner for notc alling her as his witness where the district attorney has obtained her affidavit reaffirm ing her trial testimony and that such belief in the final district attorney s affidavit reflects that the hearing judge has accepted the belief that the district attorney s affidavit is the truth without sufficient evidence and a new trial should be ordered.

C. Whether a defendant is denied due process of law, the right to confrontation and fundamen tal fairness when a recanting victim s hearsay statements to the district attorney are allowed into evidence resulting in a finding that the recanting deposition and affidavits were the result of pressure, when the recanting victim has become the district attorney s witness in an affidavit on the eve of the post-conviction relief hearing where she reaffirms her trial testimony but the district attorney does not call her to the stand.

D. Whether the trial judge abused his discretion upon a hearing of the prisoner's motion for

reconsideration which attached affidavits which materially contradicted the state's evidence at the evidentiary hearing by refusing to consider the affidavits and refusing to reconsider the denial of post-conviction relief and thus defendant is denied due process of law, the right to confrontation and

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fundamental fairness.

On September 23, 2003, the Mississippi Court of Appeals affirmed the circuit court's denial of Rushing's motion for post-conviction relief. ~ Rushing v. State, 873 So. 2d 116 (Miss. App.2003), reh'g denied, January 20, 2004; cert. denied, May 20, 2004.

On February 14, 2005, Rushing filed his petition for writ of habeas corpus in this court, raising the following grounds:

> Ground A - Ineffective Assistance of Counsel under the Sixth Amendment to the United States Constitution:
>
> > (1) Trial counsel failed to adequately prepare for trial in that he did not obtain and use police reports, rape kit, emergency room records as well as statements by the victim in which she indicated the sex was consensual; did not issue subpoenas or view photographs until the day before trial; failed to develop sexual history between petitioner and victim; and failed to introduce information regarding the paternity of victim's child.
> >
> > (2) Trial counsel failed to file motion requesting severance of Counts one and two.
> >
> > (3) Trial counsel failed to call Tommy Johnson, the utility worker who interrupted the alleged rape and failed to call the doctor

who performed the rape kit.

(4) Trial counsel failed to thoroughly cross-examine the victim regarding the utility worker, her inconsistent statements and whether she was forced to have sex with petitioner.

(5) Trial counsel failed to attack victim's veracity by questioning victim and other witnesses.

(6) Trial counsel should have objected when the prosecution used Rushing's alias, "Devil Catcher," numerous times throughout the trial.

Ground B - Petitioner was denied due process of law under the 14th Amendment because the "forcible and no consent" element of rape was not proven beyond a reasonable doubt.

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Ground C- Petitioner was denied a fair trial by jury since the prosecution used unfair, irrelevant tactics and dominated Ms. Lynch and thus petition er was denied a fair trial by a fair jury and due process of law under the 14th Amendment to the United States Constitution.

Ground D - The jury was not properly instructed and if all the witnesses and contradictions had been presented at trial petitioner would not have been convicted, since he is actually innocent and thus he is being denied "fundamental fairness" and due process of law under the 14th Amendment to the United States Constitution.

Ground E - Petitioner was denied a fair trial by a fair jury because the testimony of the alleged victim Marilyn Lynch is now shown through her post trial affidavit as inadequate to constitute forcible rape and Ms. Lynch has now stated under oath facts to support the conclusion that there was no force surrounding the sex, but the sexual acts were by consent and thus petitioner has been denied his rights to due process under the 14th Amendment to the United States Constitution.

Ground F - Whether a jury instruction on aggravated assault with a "deadly weapon" without the element of "serious bodily injury" is a variance from an indictment that does not have "deadly weapon" as an element but only has "serious bodily injury" and the defendant is denied proper constitutional notice of the charges, a fair trial, the right to confrontation and due process of law.

Ground G. Whether jury instructions on aggravated assault are "plain error" as a judicial comment on the evidence by containing the phrases "when used as a weapon under the existing circumstances" and the phrase "a deadly weapon, specifically a broken pool stick" and thus the defendant is denied a fair trial, confrontation of witnesses and due process of law.

Ground H. Whether the jury instructions under facts which showed hitting with a broken pool stick, pointing a gun and kicking with a foot are fatally confusing and abstract when the only specific reference to "deadly weapon" in the instructions points to the pool stick and thus the defendant is denied a fair trial and due process of law and trial by jury.

Ground I - Whether the evidence of forcible rape is sufficient to support a verdict of guilty when there was no contemporaneous force and the victim had many opportunities to seek aid, assistance and flee from the presence of the defendant with whom she had a long term beneficial sexual liaison and she traveled with him back to her trailer and nearly twelve hours after the coupling first told the interrogating officer she had not been sexually assaulted.

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Ground J - Whether the defendant was denied his right to confrontation of witnesses and a fair trial when moments before the victim s son was to testify, the state first disclosed to the defendant that the son would testify to defendant's admission of assaulting the mother and testify that the defendant had made three valuable offers to the mother if she would drop the charges.

Ground K - Whether the defendant was denied his right to confrontation of witnesses and a fair trial when the court refused admissibility of the victim s contradictory statement to the interrogating officer that she had not been sexually assaulted.

Ground L - Whether the evidence was sufficient to support a verdict of aggravated assault, when the victim only had bruises, redness on the throat from alleged choking and a broken finger and gave a contradictory and exaggerated account of the incident with the defendant at the bar and much later engaged in voluntary sex with him after rejecting an opportunity to return to her trailer alone without defendant.

Ground M -There was no proof beyond a reasonable doubt of the elements of forcible rape and due process was denied with the state failing to meet its burden of proof. Both convictions should have been reversed because the joint trial, without severance of the count for aggravated assault, so infected a fair jury trial on the rape count, that due process was denied. The forcible rape and an instruction on "feloniously" should have been granted when requested by the jury.

Ground N - The prosecution used unfair tactics denying a fair trial by the two count indictment, knowing the proof was not there on the rape count and by inflaming the jury with the Petitioner's citizens band "handle" of "Devil Catcher" in the indictment and constantly referring to him by that name at trial. The State dominated the alleged victim Marilyn Lynch on the sex testimony contrary to the facts.

Ground O - Material evidence was not presented that would have resulted in an acquittal and some of this is newly discovered evidence.

Ground P - The trial counsel was ineffective by failing to adequately prepare for trial, advise Petitioner of the trial date weeks before and not just a few days before and failure to ask for a continuance because of a pending DNA paternity test that would have revealed Ms. Lynch falsely accused Petitioner of being the father. Trial counsel failed to obtain the E.R. records on Ms. Lynch's visit to Riley Hospital, which reveal no rape and contradict the charge of rape. Trial counsel was ineffective by failing to adequately cross-examine adverse witnesses especially and to call material

witnesses and cross-examine Ms. Lynch on prior material substantial conflicting statement of "no rape" and other statements and testimonial conduct. In particular, counsel should have pointed out that Lynch told Detective McElhenny that she was not restrained at the trailer, only at the Club. Counsel failed to seek a severance and adequately to argue his Motion for Directed Verdict. Improper and unfair jury instructions were not opposed and counsel did not present adequate instructions on the forcible rape. Also, the prosecution used peremptory jury challenges to exclude Blacks, the final jury being 10 whites and 2 Blacks, but trial counsel made no objection and no argument against violation of Batson.

Ground Q. Ms. Lynch changed and elaborated upon her testimony in affidavits and a deposition where she was represented by counsel which confirms no rape took place, but the sex was consensual and thus due process and a fair trial were denied. The rape accusation was manufactured by the Meridian Police Department as unfair leverage to exact a guilty plea from Petitioner on the aggravated assault count. The two count indictment was an unfair tactic and a severance should have been requested and granted.

Ground R - If there had been a fair trial, without prejudicial linking of the aggravated assault and all the evidence heard, and the jury properly instructed, there would have been an acquittal of James Rushing of forcible rape. Rushing is actually innocent of the rape count.

As the State correctly points out, the fifteen grounds set out by petitioner are repetitive, and thus, for ease of analysis will be regrouped into eight issues/grounds, as suggested by the State: (1) sufficiency of the evidence (Grounds B, I, L and M); (2) ineffective assistance of counsel (Grounds A and P); (3) prosecutorial misconduct

(Grounds C, N and Q); (4) improper jury instructions (Grounds D, F, G, H and M); (5) actual innocence/new evidence (Grounds E, H, O, Q and R); (6) improper admission of evidence (Ground J); (7) improper exclusion of evidence (Ground K); and (8) severance (Grounds M and Q). In response to the petition, the State argues that the applicable portions of the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"], Pub. L. 104-132, 110 Stat. 12144, prevent this court from granting relief based upon Rushing s petition.

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II STANDARD OF REVIEW

The instant case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), contained in 28 U.S.C. 2254(d) (2002). The applicable provision provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or *involved an unreasonable application of clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added).

Under AEDPA, where the state court adjudicated the petitioner s claim on the merits, this court reviews questions of fact under § 2254(d)(2), while questions of law

or mixed questions of law and fact are reviewed under § 2254(d)(1). Factual findings are presumed to be correct, and the court defers to the state court s decision regarding factual determinations unless it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Hill v. Johnson, 210 F.3d 481, 485 (5th Cir. 2000)§ 2254(d)(2). The court independently reviews questions of law and mixed questions of law and fact to determine whether the state court s decision thereon was either "contrary to" or an "unreasonable application of federal law. Williams v. Taylor, 529 U.S. 362,403-408 (2000); Hill, 210 F.3d at 485.

The first step in this inquiry is to determine what federal law should be applied to the

state court's decision. Williams, 529 U.S. at 404. The determinations of the state courts must be tested against "clearly established Federal law, as determined by the Supreme Court of the United States." Id.; § 2254(d)(1). Next, this court must determine whether the state court's decision was "contrary to" that established Federal law. The proper standard is an objective one, not subjective. at 408-409. The term "unreasonable" was distinguished from "erroneous" or "incorrect"; thus, a state court's incorrect application of the law may be permitted to stand if it was, nonetheless, "reasonable."

A summary of the AEDPA law is that ultimately, "[to prevail on a petition for writ of habeas corpus, a petitioner must demonstrate that the state court proceeding 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Robertson v. Cockrell, 325 F.3d 243, 247-48 (5th Cir. 2003) (en banc) (quoting 28 U.S.C. § 2254(1)U) (2000)). The courts have no authority to grant habeas corpus relief simply because "we conclude, in our independent judgment, that a state supreme court s application of [federal] law is erroneous or incorrect." Catalan v. Cockrell, 315 F.3d 491, 493 (5th Cir. 2002) (citation and quotation omitted).

III. FACTS

On February 3, 1997, shortly after mid-night, Rushing called M.L., his mistress of five years with whom he had a young child, to let her know that he was on his way to pick her up. M.L. told him that she was on the phone with her aunt and with her sister. Rushing then accused M.L. of lying because he was on his other line with M.L.'s sister. Upon arriving at M.L' s trailer, which Rushing had provided to her and their young child, he noticed that several of the

appliances were missing. Rushing asked M.L. whether she had used the money he had given her to pay the rental company. M.L. insisted that she did, but that the rental company had, nonetheless, repossessed the items.

M.L. testified that as she and Rushing, whose alias was "Devil Catcher," headed to his night club, he was angry about the appliances and telephoned a friend, whom she presumed to be Eddie Cole. While he was on the phone, Rushing remarked that he had "this bitch in the car and was trying to find somewhere to kill her." Upon arrival at the empty club, Rushing told M.L., "[a]fter tonight I am not going to worry about you lying to me; you will be out of my life." Inside the club, Rushing cursed M.L, demanding that she take off her clothes. After she complied, he beat her on the buttocks, arms, back and leg with a broken pool stick, threatened her with a gun, stomped on her, and choked her while he stating that she needed to die. After over forty minutes of brutality, Rushing drove a barely conscious M.L. to her trailer. After arriving at her trailer, Rushing stated: "Well. I suppose that you don't want to f— now, huh?" M.L. declined his offer and after laying across the hood of his car to compose herself, went into the trailer.

After she removed her clothes, got into bed and declined Rushing's further advances, she drifted in and out

of consciousness, until after daybreak when her aunt called. Because Rushing was in bed beside her, M.L. did not tell her aunt about his attack at the club. After the call when Rushing requested sex a third time, the M.L. testified that they had the following exchange:

> I kept telling him no. Well, we did have sex. He kept on messing with me. And he told me, he said, Well, I don't want you half f****** me. And then he said, You really don't want to do this, do you? I said, No, I don't. He said, Well, if want to f~"", I am going to have to go somewhere else? I said, Yes, you do. I laid down on the bed. And I laid back down on the bed and he told me, he said, Well, you are going to f*** me before I leave here, even if it's the last time.
>
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After this conversation, M.L. relented, believing that he would not leave her alone until she had sex with him. Later that evening, her aunt came to her home and drove her to the hospital. The police officer dispatched to the hospital observed bruises on M.L.'s arms and legs. Later on the evening of February 3, 1997, M.L. filed charges against Rushing. On a return trip to the hospital to undergo a sexual assault examination, the examining nurse noted a red mark on her neck and bruises to her buttocks, left thigh and upper arm. An x-ray further revealed a broken finger.

For his part, Rushing testified at trial that while they were at the club, discussing the missing appliances, M.L. came at him with the broken pool cue. He stated that as he stood up, he accidentally knocked her back. He claimed that he hit her with the cue stick no more than four times and denied that he required her to disrobe and that he stomped or choked her. According to Rushing, the next morning, as a way to apologize for lying about the appliances, M.L. initiated sex with him, during which he noticed no bruises on M.L.

Rushing was represented at trial by Attorney Pat Jordan, whereas the State was represented by Assistant

District Attorneys Greg Malta and Rick Fortenberry. The Honorable Robert W. Bailey. Circuit Judge, presided at the trial.

IV. DISCUSSION OF ASSIGNED ERROR AND THE APPLICABLE LAW

A. Issue One- Sufficiency of the Evidence (Petitioner's Grounds B, I, L and M)

The inquiry pertinent to Rushing's claim of insufficient evidence to support his rape conviction2 is "whether, after reviewing the evidence in the light most favorable to the

(**Fn. 2** Given that the Mississippi Court of Appeals reversed and remanded Rushing s aggravated assault conviction, any challenge to that conviction is moot.)

prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); Hughes v. Johnson, 191 F.3d 607, 619 (5th Cir. 1999) (quoting Jackson). The court, "in applying this standard... refers to the state's criminal law for the substantive elements of the offense." Hughes, 191 F.3d at 619.

On direct appeal, Rushing made the following argument regarding the sufficiency of the evidence on the rape charge:

> Rushing argues that the evidence was insufficient to support the jury verdict finding him guilty of forcibly raping the victim because no contemporaneous force was used, the victim had many opportunities to seek aid, assistance, and flee from Rushing, the victim had had a long-term sexual relationship with Rushing, the victim had waited nearly twelve hours after the attack to report the rape, and the victim had denied she had been raped when first questioned by an officer.

Rushing, 753 So. 2d at 1142.

The Mississippi Court of Appeals rejected this argument, stating:

> Rushing was convicted under Miss. Code Ann. § 97-3-65(2) (Rev.1994) which provides:
>
> > Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person s consent....
>
> Reviewing the evidence in the light most favorable to the State, we find the evidence was sufficient to establish and to support the three elements necessary to prove rape, i.e., (a) carnal knowledge, (b) without consent and by force, and (c) of a female age fourteen or upward. Halley v. State, 537 So. 2d 411, 414 (Miss.1988).
>
> As the Mississippi Supreme Court noted in Hull v. State, 687 So.2d 708, 723 (Miss. 1996):
>
> [O]ne of the elements of rape is that it is done "without consent and by force, While this is true, this Court stated in Stewart v. State, 466 So.2d 906 (Miss.1985):

> The well-settled rule is that in a prosecution for rape, physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm.
>
> Thus, proof that Rushing used additional, contemporaneous force to have sexual intercourse with M.L. is unnecessary if the evidence establishes

that she surrendered because of fear arising out of a reasonable apprehension of great bodily harm. The evidence established that the victim was cursed, severely beaten while nude, and threatened with a gun before she was returned to her trailer. The victim drifted in and out of consciousness throughout the remainder of the night and early morning. Although no contemporaneous force was inflicted upon the victim, the jury could reasonably find that the victim submitted to sexual intercourse with Rushing out of fear that to resist would cause Rushing to further inflict bodily injury upon her. Indeed, the victim stated her belief that Rushing would not leave her alone, or leave, until he had sexual intercourse.

Rushing contends that M.L. consented to sexual intercourse. Rushing suggests that the fact M.L. had the opportunity to seek, aid, assistance or to flee from him and did not do so, is consistent with acts of consensual intercourse. While the jury might appropriately consider these matters on the issue of consent, they were not dispositive. These matters must be weighed against the evidence offered in opposition to Rushing's suggestion of consensual intercourse.

The most important part of that evidence was the testimony of M.L. wherein she (1) denied having engaged in consensual intercourse, (2) stated that Rushing had, "beat me half senseless", and (3) stated her belief that Rushing would not leave her alone or leave her, until he had intercourse with her.

The conflict in testimony merely raised a question of credibility. Questions of credibility are to be resolved by the finders of fact, the jury. Eakes v. State, 665 So. 2d 852, 872 (Miss. 1995). When the record contains credible evidence consistent with the jury verdict, this Court is obligated to affirm that verdict. Holmes v. State, 660 So. 2d 1225, 1227 (Miss. 1995),

> unless to do so would work an unconscionable injustice. White v. State, 732 So. 2d 961 (Miss. 1999).
>
> Based upon the record before it, this Court finds that substantial credible evidence existed upon which the verdict could have found Rushing guilty of rape. Holmes v. State, 660 So. 2d 1225, 1227 (Miss. 1995). This assignment of error is without merit.
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Rushing, 753 at 1142-43.

Clearly, the state court applied the same standard to the evidence as set forth in Jackson, noting that it was the jury's duty to determine the credibility of witnesses. The undersigned has reviewed the evidence and finds that the state court's decision was not an unreasonable application of Jackson to the facts in this case. As set forth by the court of appeals, there was evidence from which a reasonable juror could conclude that M.L. surrendered to Rushing because of fear arising out reasonable apprehension of great bodily harm. The jury heard and obviously believed her testimony to the effect that Rushing had savagely beaten her the night before and that in light of the beating, she thought that he might do the same if she continued to resist him. As the Mississippi Court of Appeals did not unreasonably apply Jackson, habeas relief may not be granted based on this issue.

B. Issue Two- Ineffective Assistance of Counsel (Petitioner's Grounds A and F)

In considering his post-conviction motion, the Mississippi Supreme Court considered Rushing's allegations that his trial counsel was constitutionally ineffective. That court rejected the claims with only a brief statement pronouncing them to be without merit. This being said, the undersigned is aware that the Mississippi Supreme Court analyzes all Sixth Amendment claims

under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), the "clearly established" law for claims of ineffective assistance of counsel. Under Strickland, a claim of ineffective assistance of counsel may only be sustained upon proof that trial counsel s performance was deficient, and trial counsel's deficiency resulted in an unfair trial. 466 U.S. at 687. Both the "deficiency" and..the"prejudice" prongs must be satisfied, or it cannot be said that

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the adversarial process was so lacking that it rendered an unreliable result, thereby denying a petitioner a fair trial..See id. at 687. To prevail on his claim, Rushing must overcome the presumption of "reasonable professional assistance" by showing counsel's errors prejudiced his defense to such a degree that there exists a reasonable probability if those errors were not committed by counsel, Rushing would not have been convicted. See. at 689-694 (holding a "reasonable probability is a probability sufficient to undermine confidence in the outcome"). Counsel is presumed to have given competent assistance, and a petitioner must overcome that presumption by demonstrating counsel s actions were not within the province of a reasonable trial strategy. See id. at 689 (to prevail on claim of ineffective assistance of counsel, petitioner must demonstrate counsel s representation fell below an objective standard of reasonable competence as a result of which he was prejudiced). Obviously applying Strickland to Rushing's claims regarding his attorney, the Mississippi Supreme Court found that no constitutional violation existed. Thus, unless the Mississippi court's decision was unreasonable application of Strickland, no habeas relief may be granted.

Rushing first charges that counsel was not prepared for trial, urging that trial counsel failed to obtain and use police reports, rape kit, emergency room records as well as a statement by the victim in which she indicated the sex was consensual; did not issue subpoenas or view photographs until the day before trial; failed to develop sexual history between petitioner and victim; and failed to

introduce information regarding the paternity of victim's child. From the undersigned's review of the record, it is clear that counsel was aware of the contents of both the hospital and police reports, as well as the negative results of the rape kit. It is clear that his decision not to introduce these items into evidence was part of his trial strategy.

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Where a record is utterly silent with regard to strategy, a reviewing court will presume counsel's action or inaction to be the product of strategy. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). As the state points out, "[d]efense counsel likely chose to take his chances with the inference of a negative rape kit as opposed to putting the doctor who conducted the examination on the stand who could have testified that a sexually active woman of the victim's age would not necessarily display signs of vaginal trauma following a rape." Further, the record demonstrates that M.L. and Rushing had been sexually involved for five-years, such that it is unclear what additional testimony on this issue would have added to the jury's consideration. Finally, where Rushing does not deny that he assaulted M.L. with the pool, the paternity of the child that M.L. claimed to be Rushing has little on whether defendant assaulted M.L. to such a degree that she feared further reprisals if she did not have sexual relations with him the next morning. Jordan cannot be deemed deficient for failing to raise the issue.

Rushing next asserts that Jordan was ineffective because he failed to file a motion to sever the aggravated assault charge from the rape charge. However, as the two-count indictment is permissible under Mississippi law, see Miss. Code Ann. § 99-7-21, Jordan was not deficient for failing to file a motion to sever. The "failure to raise meritless objections is not ineffective lawyering; it is the very opposite." Clark v. Collins, 19 F.3d 959, 966 (5th Cir.1994). The failure to assert a meritless objection cannot be grounds for a finding of deficient performance. Emery v. Johnson, 139 F.3d 191, 198 (5th Cir.1997) (citing Clark, 19 F.3d at 966).

Rushing further complains that defense counsel failed to call as witnesses, the doctor who performed the rape kit and a utility worker who knocked on M.L' s trailer door and talked to her while Rushing was still there. As stated previously, Jordan's decision not to call the doctor was

trial strategy. Moreover, where the victim admitted that she did not disclose her circumstances to the utility worker, his testimony would have added little to the jury's consideration. Complaints of uncalled witnesses are not favored in a federal habeas corpus court because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative. McCoy v. Cabana, 794 F.2d 177, 183 (5th Cir.1986). Relief is not warranted on this basis.

Rushing also takes issue with his counsel's performance during the cross-examination of M.L. According to Rushing, he did not adequately cross-examine her and did not attack her veracity. Specifically, he complains that counsel did not ask M.L. if she had been forced to have sex, failed to point out that the victim stated that she had been restrained at the club, but was not restrained at the trailer and failed to properly inquire about her inconsistent statements on the question of rape. However as recognized by the state, given that the prosecution's theory of the case was that the victim submitted to the rape due to the fear engendered as the result of the severe beating by Rushing the night before at his club, it was entirely logically that Jordan would not ask M.L. if Rushing "forced" her to have sex. Further, the record shows that M.L. admitted that at the hospital, when she initially asked about a possible sexual assault, she responded in the negative. The inconsistency was before the jury and the jury apparently credited M.L.'s testimony regarding the reason for her initial negative response as well as her version of the night's events.

Next, Rushing asserts that Jordan was ineffective for failing to object to the prosecution's frequent reference to his nickname "Devil Catcher" and that Jordan did not adequately argue his motion for a directed verdict. Here, the record reflects that Rushing was known by the victim

and the community by this name. Defense counsel promptly explained to the jury that it was Rushing's CB handle. Assuming arguendo that Jordan should have objected to the use of the nickname, given that the victim knew Rushing by this name and that the nickname itself was not suggestive of a criminal disposition, the court does not perceive that the use of the nickname was highly prejudicial to Rushing. Cf. United States v. Roberson, 124 Fed. Appx. 860 (5th Cir. 2005) (examining the propriety for using a nickname during trial). Further, the court has reviewed the record wherein Jordan argued for a directed verdict as to the rape charge. Jordan's argument was consistent with the defense theory—Rushing did not force M.L to have sex with him. There was no deficiency or prejudice in this regard.

Rushing also complains that Jordan failed to offer an instruction which would have defined "forcible" in the context of rape and one which defined "feloniously. He also charges that Jordan failed to object to improper jury instructions. The trial court gave the following instruction on rape:

> The Court instructs the jury that should you find from the evidence in this case beyond a reasonable doubt that:
>
> 1. On or about the February 3, 1997, in Lauderdale County, Mississippi;
>
> 2. The defendant, James R. Rushing, a male person over the age of 18 years, did willfully, unlawfully, feloniously and forcibly engage in sexual intercourse with Marilyn Lynch without her consent, then it is your

sworn duty to find the defendant, James R. Rushing, guilty of rape under Count II of the indictment in this cause.

Should the State fail to prove any one or more of these essential elements beyond a reasonable doubt, then you shall find the defendant, James R. Rushing, not guilty under Count II of the indictment in this cause.

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As the State points out, this instruction was not contrary to the rape statute as existed at the time that Rushing was indicted.(**FN**3) Given that any proper instruction on the "force" element would have explained to the jury that "physical force on the part of the assailant or physical resistance on the part of the victim is not necessary if the proof shows beyond a reasonable doubt that the victim surrendered because of fear arising out of a reasonable apprehension of great bodily harm," Jordan cannot be deemed deficient for falling to request an instruction that would have served to present the prosecution's theory of the case.

During its deliberation, the jury did request a definition of "feloniously." After defense counsel, for reasons not stated in the record, rejected the prosecution s proposed definition, derived from Black's Law Dictionary, the court informed the jury that a definition could not be provided. Assuming arguendo that Jordan erred by failing to provide a definition , the undersigned is not persuaded that Rushing was prejudiced by the failure. That is, where the instructions on the whole accurately stated the law, Rushing has not shown that, but for the lack

(**Fn 3** On the day that Rushing was indicted, Miss. Code Ann § 97-3-65(2) provided:
Every person who shall forcibly ravish any person of the age of fourteen (14) years or upward, or who shall have been convicted of having carnal knowledge of any person above the age of fourteen (14) years without such person s consent, by administering to such person any substance or

liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.)

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of an instruction defining "feloniously,"(**FN4**) he would not have been convicted on the rape charge. Finally, the record indicates that Jordan did object to numerous jury instructions offered by the state, including the one upon which the Court of Appeals reversed his conviction for aggravated assault.

Lastly, the undersigned concludes that petitioner's assertion that Jordan failed to make a Batson challenge is without merit. As the State points out, Rushing has utterly failed to "make particularized allegations or to identify probative evidence in the record tending to support his allegations." United States v. Flores, 125 F. 3d 1000, 1006 (5th Cir. 1998). He has not directed the court's attention to any specific juror who was wrongfully excluded from the jury pool and has not offered any meaningful argument that the prosecution improperly utilized its peremptory strikes. Certainly, he has not shown that Jordan was deficient by not raising this issue.

Having reviewed the trial record, the undersigned finds no deficiencies in counsel's performance. Applying the standard of review required by AEDPA. the undersigned further finds that the state's application of the law [i.e., the Strickland standard] to the facts in Rushing's case was clearly not unreasonable in light of the evidence. Rushing attorney's representation was vigorous and comprehensive. As both the United States Supreme Court and the Fifth Circuit Court of Appeals have recognized, a criminal defendant is not constitutionally entitled to a perfect trial, just a fair one. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986); Sawyer v. Butler, 848 F.2d 582, 594 (5th Cit 1988).

A review of the record confirms the undersigned's conclusion that Rushing did receive a fair trial, represented by adequate counsel and thus, that the

(Fn 4"The term 'feloniously means unlawfully with the intent to commit a felony-grade crime." Winston v. State, 127 Miss. 477,484-85 (Miss. 1921).)

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Mississippi courts did not unreasonably apply Strickland. Relief is not warranted as to this issue.

C. Issue Three- Prosecutorial Misconduct (Petitioner's Grounds C, N and O)

According to Rushing, in obtaining his conviction, the prosecution used unfair and irrelevant tactics and also "dominated" the victim. He further complains that the prosecution improperly referred to him as "Devil Catcher" throughout the trial. Although he fails to say as much in his petition before this court, by unfair and irrelevant" tactics, Rushing apparently refers to his belief that the prosecution and the Meridian Police Department intentionally charged him with rape and aggravated assault to extract a plea on the aggravated assault charge. By his accusation that the prosecution "dominated" the victim, Rushing apparently is proceeding on a theory that the State scripted M.L.'s trial testimony and later "persuaded" her to recant the deposition testimony that she gave in connection with Rushing s application for post-conviction review. In her deposition, M.L. recanted her trial testimony that Rushing raped her. The Mississippi Supreme Court rejected these claims, and the undersigned finds that its decision in this regard does not amount to an unreasonable application of clearly established law. As the State points out, the record does not substantiate either of Rushing's charges of improper conduct related to the decision to charge Rushing with aggravated assault and rape or of "dominating" the victim during either the trial or during the post-conviction proceedings; nor has Rushing purported to offer any new evidence (or argument on this issue) in support of these assertions to this court.

Regarding the prosecution's references to "Devil Catcher" given that trial counsel explained that the moniker was Rushing's C.B. handle and that the name is not particularly

suggestive of criminal activity, Rushing has not demonstrated that the use of "Devil Catcher" during trial was harmful to him; that is, he has not shown that it rendered his trial fundamentally unfair. See United States v. Rodriguez, 43 F.3d 117, 124 (5th Cir. 1995) (prosecutorial remarks "must be more than undesirable or condemnable; they must be so pronounced and persistent as to cast serious doubts on the verdict"); Ortega v. McCotter, 808 F.2d 406, 410 (5th Cir. 1987) (remarks must have been a "crucial, critical, highly significant factor in the jury s determination of guilt"); United States v. Parker, 877 F.2d 327, 332 (5th Cir. 1989) (in determining whether defendant s due process rights were violated by prosecutorial misconduct, first inquiry is whether the prosecutor s comments were indeed improper; the second is to evaluate whether the comments were harmful). In light of the foregoing, Rushing is not entitled to relief as to this issue.

D. Issue Four- Jury Instructions
(Petitioner's Grounds H, F, G, H and M)

Rushing makes a two-prong attack on the jury instructions. First, he contends that instructions C-7 and C-9 were improper, thereby denying him a fair trial. Secondly, he again complains that his right to a fair trial was deprived because the jury was not provided a definition of "forcible" or "feloniously." The State argues, and correctly so, that neither of these arguments provides a basis for habeas relief.

Generally, challenges to jury instructions may not form a basis for federal habeas corpus relief. Gilmore v. Taylor, 113 S. Ct. 2112, 2118-19 (1993). Only if an instruction was so unfair as to rise to the level of a constitutional violation would relief be appropriate. Id. A jury instruction should not be given when the charge is not

supported by the evidence, and due

process does not require otherwise. Hopper v. Evans, 456 U.S. 605, 611(1982). Petitioner s arguments regarding the jury instructions only related to purported errors of state law, even though the Petitioner has attempted to frame them as constitutionally deficient. The Mississippi Supreme Court may interpret its own law, and this court does not sit as a superior state court to review supposed errors of state law. "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions." Trevino v. Johnson, 168 F.3d 173, 184 (5th Cir. 1999).

Only if any of these errors so unfairly prejudice his trial so as to render it fundamentally unfair would it violate Rushing's Due Process rights. The issue for this Court is not whether state law was violated, or whether any error prejudiced the petitioner. The issue is whether the giving of the instruction or the failing to give the instruction "so infected the entire trial that the resulting conviction violates due process." Galvan v. Cockrell, 293 F.2d 760 (5th Cir. 2002). Even then, the undersigned's review is limited to determining whether the state court's decision was an *unreasonable application of clearly established federal law*, or contrary to such law, under AEDPA.

Here, the undersigned finds that the claims regarding the jury instructions simply are not of a constitutional magnitude and that the state court's decision is entirely reasonable and violates no federal law. Instructions C-7 and C-9 instructed the jury on the aggravated assault charge. As set forth above, the Mississippi Court of Appeals concluded that C-7 was improper and upon this conclusion, reversed Rushing's aggravated assault conviction. Rushing argues that if the jury had been properly instructed on the aggravated assault charge, they could not have found him guilty of the rape charge. This argument essentially challenges the sufficiency of the

evidence. As the undersigned set forth supra at p. 13-16, the state court decision regarding the sufficiency of the evidence on the rape charge does not constitute an unreasonable application of Jackson, and thus, no relief is warranted. Likewise, in connection with evaluating petitioner's ineffective assistance of counsel claim, the undersigned has addressed the lack of jury instructions defining "feloniously" and "forcibly," concluding that where the instructions on the whole correctly set forth the elements of rape, any failure on Rushing's attorney's part to proffer these definitions did constitute ineffectiveness. Similarly, by refusing to provide the jury with these definitions, the trial court did not deny Rushing a fair trial. Accordingly, the undersigned finds that the appellate court s decision denying relief was not unreasonable or incorrect and thus, that relief should be denied as to this ground.

E. Issue Five- Actual Innocence/New Evidence (Petitioner's Grounds E,H, O, Q and R)

In Issue Five, petitioner argues that the trial court erred in denying him a new trial as was sought by his motion for post-conviction relief. According to Rushing, the new evidence presented to the trial court during the evidentiary hearing on his motion for post-conviction review establishes that he was actually innocent of the rape charge. At this hearing, Rushing presented two affidavits from and the deposition testimony of M.L., wherein she stated she recanted her trial testimony regarding the rape. For its part, the State presented a more recent affidavit from M.L. In the affidavit that the State presented, M.L. recited, in part, that

> [t]he deposition I gave to Mr. Rushing's attorney was given because I was feeling sorry and a little guilty for Mr. Rushing. I was tired of all the phone calls I was getting day and night just about every day until my phone was turned off. His friends were always asking why I did it and trying to make me feel bad.

> But after thinking long and hard about it, I couldn' t live with
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>
> myself if I told a lie and changed my testimony. At least now I still have my self-respect and dignity for sticking with the truth.

Neither side called upon M.L. for live testimony, and after receiving the evidence, the trial court ruled as follows:

> This Court has considered the trial testimony of the victim, along with her recanted testimony contained in the affidavits submitted and the deposition taken, as well as the affidavit she provided to the District Attorney. The Court is confident that she testified truthfully at trial and in her affidavit made on August 20, 2001. The victim stated in her affidavit that she was tired of the calls she was receiving and that she could not live with herself if she did not tell the truth. The Court is also of the opinion that the victim bent to pressure from the Petitioner and others in recanting her trial testimony. This Court does not know what the victim would have stated had she been called to testify at the evidentiary hearing and will not speculate to what she might testify. The Court is of the opinion that the recanted testimony is material, but that because the victim has now stated that it was in fact rape, along with her reason for recanting her testimony and because she did not testify at the evidentiary hearing, the Petitioner has not proven that a different result would be reached if a new trial was provided. Therefore, the Motion for New Trial is hereby denied.

As the State correctly points out, absent an independent constitutional violation occurring in the state trial, actual innocence based on new evidence relevant to the guilt of a state prisoner is not cognizable on federal habeas corpus. Herrera v. Collins, 506 U.S. 390, 400, 404

(1993); Graves v. Cockrell, 351 F.3d 143 (5th Cir. 2003); Jacobs v. Scott, 31 F.3d 1319, 1324 (5th Cir. 1994). Instead, actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Id. at 404. As petitioner does not assert actual innocence in an effort to overcome a procedural bar, he has failed to state a claim on which the court may grant relief and the claim is subject to dismissal.

F. Issues Six, Seven and Eight- State Law Errors (Petitioner's Grounds J K, M and Q)

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Rushing's contentions in Issues Six through Eight generally raise claims regarding Mississippi law, and these do not rise to the level of constitutional violations. Further, the Court of Appeals and the Mississippi Supreme Court considered and rejected these assertions on the merits. Unless Rushing can show that the court s decision was an unreasonable application of clearly established federal law, no habeas relief can be granted. The undersigned finds that the state courts, in rejecting these contentions, violated no federal law.

For example, Rushing contends that the trial court erred in denying his motion to exclude the testimony of the victim's son, R.L., because the prosecution failed to timely disclose its contents in violation of Rule 9.04 of the Uniform Rules of Circuit and County Court Practice. According to the petition in this court, this had the effect of denying him the right to confront a witness and the right to a fair trial. At trial, R.L. testified that: (1) Rushing offered to give M.L. money, a house and car repairs, if she would drop the charges; (2) Rushing admitted he had hit M.L.; and (3) Rushing denied raping M.L. The Mississippi Court of Appeals found a technical violation of the rule, but concluded that the error was harmless, apparently because both parties had indicated that they would call R.L. as a witness. The record reflects that R.L was subject to cross examination on the "valuable offers." And Rushing himself testified that he had made offers of money and a house to

M.L. in an effort to support their child, not as an incentive to drop the charges. Rushing was neither denied the right to confront R.L. or the right to a fair trial, and his effort to somehow recast this state law error as a constitutional infirmity fails.

Issue Seven involves the trial court' s exclusion of M.L.' s written statement to the investigating officer. This is a simply an evidentiary matter, which is ordinarily not a basis for habeas relief. A federal court in a habeas corpus petition reviewing state evidentiary rulings does

not sit as a superior state supreme court to review error under state law. Bridge v. Lynaugh, 838 F.2d 770 (5th Cir. 1988). An evidentiary error in a state trial does not justify federal habeas corpus relief unless it is of such magnitude as to constitute a denial of fundamental fairness under the Due Process Clause. Id. at 772. Here, on appeal, the Mississippi Court of Appeals concluded that the trial court was within its discretion in refusing to admit the written statement and observed that Rushing was not deprived of his opportunity to cross-examine both M.L. and the investigating officer regarding her initial statement to the effect that she had not been sexually assaulted.

In Issue Eight, Rushing charges that his due process rights were violated by the trial court s failure to sever the counts of the indictment and try him separately on each count. Although he offers no further argument on this issue in his petition before this court, in state court, Rushing took the position that because the assault and rape were separate incidences which occurred at different locations, the failure to sever these charges was a violation of Mississippi Code Ann.§ 99-7-2(1) **FN5** Simply put, this alleged error of state law does not rise to the level of a constitutional deprivation and therefore, is not subject to review by this court. As these claims fail to provide a basis for habeas relief, they should be dismissed.

V. CONCLUSION

(**Fn 5** This section provides, in pertinent part, that two or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based upon the same act or transaction; or (b) the offenses are based two or more acts or transactions that connected together or constituting parts of a common scheme or plan.)

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For the reasons discussed above, the undersigned recommends that the petition should be dismissed with prejudice.

The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendation contained within this report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. 28 U.S.C.§ 636, Douglass v. United Services Auto. Ass'n, 79 F.3d 1415, 1428-29(5th Cir. 1996).

RESPECTFULLY SUBMITTED, this the 8th day of February, 2008.

s/ James C. Sumner
UNITED STATES MAGISTRATE JUDGE